

Letter of Findings: 04-20170209P
Gross Retail Tax
For the Years 2013, 2014, and 2015

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

The Department found that Indiana Company - in the business of renting recreational vehicles - was not entitled to an abatement of a one-hundred percent fraud penalty; Indiana Company collected substantial amounts of sales tax from its rental customers over a three-year period and failed to report or remit that tax to the state.

ISSUE

I. Gross Retail Tax - Fraud Penalty.

Authority: IC § 6-2.5-9-3; IC § 6-8.1-5-1(c); IC § 6-8.1-10-4(a); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480 (Ind. Tax Ct. 2012); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463 (Ind. 2012); *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138 (Ind. Tax Ct. 2010); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 15-5-7\(f\)\(3\)](#); [45 IAC 15-5-7\(f\)\(3\)\(A\)](#); [45 IAC 15-5-7\(f\)\(3\)\(B\)](#); [45 IAC 15-5-7\(f\)\(3\)\(C\)](#), (D), (E).

Taxpayer argues that it is entitled to an abatement of the one-hundred percent fraud penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of renting recreational vehicles. The Indiana Department of Revenue ("Department") conducted an audit review of Taxpayer's business records and tax returns. The audit resulted in an assessment of sales tax and a fraud penalty. Taxpayer disagreed with the penalty portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Fraud Penalty.

DISCUSSION

The issue is whether Taxpayer is entitled to an abatement of the one-hundred percent fraud penalty. Taxpayer argues that it was unaware that it was required to collect sales tax to rental transactions in which the customer lived in another state. Taxpayer explains that it is "now paying a considerable amount of sales tax every month without fail and it is not, and has never been our intention to avoid [its] sales tax responsibility."

In reviewing Taxpayer's rental invoices, the audit found that Taxpayer had billed its customers approximately \$300,000 in sales tax over the course of the three-year audit period and collected that amount from those customers for Indiana transactions. Over the course of that same three-year period, Taxpayer remitted approximately \$2,900 in sales tax to Indiana. Taxpayer explained that it was uncertain as to its sales tax responsibility because it was unsure as to whether it was or was not required to charge its customers sales tax. In what it characterizes as an over-abundance of caution, it charged its customers sales tax in the event that its rental transactions eventually proved to be subject to tax but did not remit those amounts to the state. In effect, Taxpayer retained approximately \$297,100 in a reserve fund.

As with any other assessment, the assessment of the penalty constitutes evidence that the Department's claim for the unpaid *[sic]* tax is valid, and each taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Thus,

a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Poorly developed and non-cogent arguments are subject to waiver. *Scopelite v. Indiana Dep't of Local Gov't Fin.*, 939 N.E.2d 1138, 1145 (Ind. Tax Ct. 2010); *Wendt LLP v. Indiana Dep't of State Revenue*, 977 N.E.2d 480, 486 n.9 (Ind. Tax Ct. 2012).

A one-hundred percent penalty was assessed because of the substantial disparity between the amount of taxes Taxpayer collected from its customers and the amount of taxes which were forwarded to the Department. IC § 6-8.1-10-4(a) states that, "If a person fails to file a return or to make a full tax payment with that return with the fraudulent intent of evading the tax, the person is subject to a penalty. (b) The amount of the penalty imposed for a fraudulent failure described in subsection (a) is one hundred percent (100 [percent]) multiplied by: (1) the full amount of the tax, if the person failed to file a return; or (2) the amount of the tax that is not paid, if the person failed to pay the full amount of tax."

The pertinent Indiana regulation, [45 IAC 15-5-7\(f\)\(3\)](#), states:

A person who files a return which makes a false representation(s) with knowledge or reckless ignorance of the falsity will be deemed to have filed a fraudulent return. There are five elements to fraud.

(A) Misrepresentation of a material fact: A person must truthfully and correctly report all information required by the Indiana Code and the department's regulations. Any failure to correctly report such information is a misrepresentation of a material fact. Failure to file a return may be a misrepresentation.

(B) Scienter: This is a legal term meaning guilty knowledge or previous knowledge of a state of facts, such as evasion of tax, which it was a person's duty to guard against. A person must have actual knowledge of the responsibility of reporting the information under contention. However, the reckless making of statements without regard to their truth or falsity may serve as an imputation of scienter for purpose of proving fraud.

(C) Deception: Deception operates on the mind of the victim of the fraud. If a person's actions or failure to act causes the department to believe a given set of facts which are not true, the person has deceived the department.

(D) Reliance: Reliance also concerns the state of mind of the victim and is generally considered along with deception. If the person's actions, failure to act, or misrepresentations cause the department to rely on these acts to the detriment or injury of the department, the reliance requirement of fraud will be met.

(E) Injury: The fraud instituted upon the department must cause an injury. This can be satisfied simply by the fact that the misrepresentation(s) caused the department not to have collected the money which properly belongs to the state of Indiana.

In order to demonstrate fraud, the Department is required to prove from the record each of the above elements set out in [45 IAC 15-5-7\(f\)\(3\)](#). Based upon the substantial disparity between the amount of tax Taxpayer collected from its customer and the amount of taxable sales reported to the Department, the Department was entitled to conclude Taxpayer committed a "misrepresentation of material fact," pursuant to [45 IAC 15-5-7\(f\)\(3\)\(A\)](#).

Bearing in mind that Taxpayer is a multi-million dollar business, the Department was entitled to conclude that Taxpayer - and Taxpayer's responsible officer answerable for the preparation of the sales tax returns - had actual knowledge of the repeated misrepresentations or that, in the alternative, Taxpayer exhibited a reckless disregard for the truth. As a result, the Department reasonably concluded that Taxpayer exhibited the "scienter" element required under [45 IAC 15-5-7\(f\)\(3\)\(B\)](#).

The Department accepted and relied upon the sales tax returns and Taxpayer's representations as to its taxable sales for a period of at least three years. In deciding to impose the 100 percent fraud penalty, the Department was justified in concluding that Taxpayer acted with intent to deceive, that the Department had mistakenly relied upon Taxpayer's representations, and that the Department was "injured" by failing to collect the amount of sales tax to which it - and by implication the state of Indiana - was entitled. Therefore, the three elements of fraud set out in [45 IAC 15-5-7\(f\)\(3\)\(C\)](#), (D), and (E) are met.

The Department declines the Taxpayer's invitation to abate the fraud penalty and reminds Taxpayer that "[i]f the individual knowingly fails to collect or remit those taxes to the state, the individual commits a Level 6 felony." IC § 6-2.5-9-3.

FINDING

Taxpayer's protest is denied.

Posted: 09/27/2017 by Legislative Services Agency
An [html](#) version of this document.